

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CASUALTY CO.
Plaintiff-Appellee,

v.

INDIAN HEAD INDUSTRIES, INC.,
Defendant-Appellant,

No. 05-CV-73918

HON. DENISE PAGE HOOD

**MOTION TO APPROVE DEPOSITING \$2,442,298.15 INTO COURT
UNDER RULE 67 F.R.Civ.P. TO SERVE AS A SUPERSEDEAS BOND
AND FOR A STAY OF ENFORCEMENT OF THE JUDGMENT
UNDER RULE 62 F.R.Civ.P.**

Indian Head Industries, Inc. ("Indian Head") moves the court under Rules 67 and 62 F. R. Civ. P. to authorize Indian Head to deposit \$2,442,298.15 into court and to approve that deposit serving as a supersedeas bond and for a stay of enforcement of the judgment of September 30, 2015 pending the outcome on appeal.

Respectfully Submitted,

s/ James E. Wynne

By: James E. Wynne (P29557)

Attorneys for Defendant-Appellant

BUTZEL LONG

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

Email: wynne@butzel.com

November 22, 2015

CERTIFICATE OF COMPLAINT WITH L.R. 7.1

On November 15 there was a conference between attorneys entitled to be heard on the motion in which the movant explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

s/ James E. Wynne

By: James E. Wynne (P29557)
Attorneys for Defendant-Appellant
BUTZEL LONG
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
Email: wynne@butzel.com

CERTIFICATE OF SERVICE

I hereby certify that this motion was served on all counsel of record on November 22, 2015 through use of the CM/ECF system.

s/ James E. Wynne

By: James E. Wynne (P29557)
Attorneys for Defendant-Appellant
BUTZEL LONG
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
Email: wynne@butzel.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CASUALTY CO.
Plaintiff-Appellee,

v.

INDIAN HEAD INDUSTRIES, INC.,
Defendant-Appellant,

No. 05-CV-73918

HON. DENISE PAGE HOOD

**BRIEF IN SUPPORT OF APPELLANT'S MOTION TO APPROVE
DEPOSITING \$2,442,298.15 INTO COURT UNDER RULE 67 F.R.C. P.
TO SERVE AS A SUPERSEDEAS BOND AND FOR A STAY OF
ENFORCEMENT OF THE JUDGMENT UNDER RULE 62 F. R. C. P.**

Concise Statement of the Issues Presented

Should the court approve a cash deposit into court in an amount in excess of the judgment to account for post judgment interest, should the court approve that deposit as serving as a supersedeas bond and should the court issue a stay of enforcement of the judgment pending the outcome on appeal?

The Controlling or Most Appropriate Authority for the Relief Sought

- 28 U.S.C. § 1961(b)
- *Hamlin v. Charter Twp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998)
- *Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (6th Cir. 1979)

- Rule 62, F.R.Civ.P.
- Rule 67, F.R.Civ.P.

Procedural Context

Under Fed R. Civ. P. 67, Indian Head Industries, Inc. (“Indian Head”) has moved the court for approval to deposit into court the sum of \$2,442,298.15, and has moved under Fed R. Civ. P. 62(d) for the district court to approve that deposit serving as a supersedeas bond and for a stay of execution on the judgment.

Argument

In support of its motions, Indian Head states as follows:

1. Appellants enjoys a legal *right* to a stay of execution upon the posting of a supersedeas bond approved by the trial court. *Hamlin v. Charter Twp. of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998).
2. Courts generally require that the amount of the bond include (a) the full amount owed under the judgment; (b) the anticipated appeal costs; (c) post-judgment interest; and (d) damages for delay caused by the appeal, unless the court fixes a different amount or orders security other than the bond after notice and hearing and for good-cause shown. *Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (6th Cir. 1979).

3. According to the Administrative Office of the United States Courts, the United States Court of Appeals for the Sixth Circuit disposes of appeals within 9.1 months, on average, from the date of the filing of the Notice of Appeal. (Exhibit 1, Report on Judicial Business of the United States Courts of Appeals, Table B-4 (Sept. 30, 2014).)

4. Under 28 U.S.C. § 1961(a), post-judgment interest is calculated from the date of the judgment at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Directors of the Federal Reserve System (“Federal Reserve”) for the calendar week preceding the date of the judgment. The Judgment was entered on September 30, 2015. The Federal Reserve’s published, applicable interest rate for the week ending September 26, 2015, is 0.34% (Exhibit 2, Federal Reserve Statistical Release (Sept. 28, 2015).)

5. Under 28 U.S.C. § 1961(b), interest is computed daily to the date of payment and compounded annually.

6. Applying the *Poplar Grove* standard, Indian Head submits that the supersedeas bond is ample if set at \$2,442,298.15, as shown below:

- a. The amount of the judgment is \$2,425,774.84.
- b. Using the statutory interest computational formula, post-judgment interest over a first full year following the judgment would be \$8,247.63 and if the appeal took two years to resolve – unlikely - the interest

accumulating in a second year after compounding is \$ 8,275.68, for a total 2 year “bond” of \$2,442,298.15.

c. Indian Head does not anticipate that Appellees will incur any appeal costs. Under 6 Cir. R. 25(1), all papers must be electronically filed, and under 6 Cir. R. 39(a), costs are not available for electronic filings.

d. Indian Head has no reason to believe that Appellees will suffer any damage by any potential delay caused by the appeal that would not be adequately compensated for by post-judgment interest.

Wherefore, Indian Head prays that the court approve a cash deposit into court by Indian Head of \$2,442,298.15 to serve as a supersedeas bond pending resolution of the appeal and that the court stay execution and enforcement of the judgment pending the outcome of the appeal.

Respectfully Submitted,

s/ James E. Wynne

By: James E. Wynne (P29557)

Attorneys for Defendant-Appellant

BUTZEL LONG

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

Email: wynne@butzel.com

November 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that this brief was served on all counsel of record on November 22, 2015 through use of the CM/ECF system.

s/ James E. Wynne

By: James E. Wynne (P29557)

Attorneys for Defendant-Appellant

BUTZEL LONG

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

Email: wynne@butzel.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONTINENTAL CASUALTY CO.
Plaintiff-Appellee,

v.

INDIAN HEAD INDUSTRIES, INC.,
Defendant-Appellant,

No. 05-CV-73918

HON. DENISE PAGE HOOD

**ORDER APPROVING A CASH DEPOSIT INTO COURT AND IT
SERVING AS A SUPERSEDEAS BOND AND STAYING
ENFORCEMENT OF THE JUDGMENT PENDING APPEAL**

It is hereby ordered that Indian Head Industries, Inc. (Indian Head”) is permitted to deposit into court under Rule 67 the sum of \$2,442,298.15 to be held by the Clerk of this Court pending Indian Head’s appeal to the 6th Circuit Court of Appeals, that such deposit is approved as a supersedeas bond in the appropriate and sufficient amount, with said deposit returned to Indian Head if successful in its appeal but otherwise to serve as security for payment of the judgment of September 30, 2015 if the judgment is fully affirmed, and pending such appeal and the continuation of the supersedeas bond enforcement of the judgment is stayed.

Ordered, this ____ day of _____, 2015

Honorable Denise Page Hood
United States District Judge

EXHIBIT 1

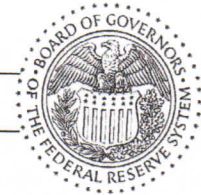
Table B-4.
U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit,
During the 12-Month Period Ending September 30, 2014

Circuit	Terminated on the Merits													
	Total	By Consolidation	Median Time Intervals From											
			Filing of Notice of Appeal or Docket Date to Filing of Appellee's Last Brief		Filing of Appellee's Last Brief to Oral Argument or Submission on Briefs		Oral Argument to Last Opinion or Final Order		Submission on Briefs to Last Opinion or Final Order		Filing of Notice of Appeal or Docket Date to Last Opinion or Final Order ¹		Filing in Lower Court to Last Opinion or Final Order in Appeals Court	
			Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval	Cases	Interval
Total	36,851	2,737	15,235	5.8	15,235	3.8	6,646	2.1	27,468	0.4	34,114	8.5	25,698	28.0
DC	634	153	299	8.1	299	5.1	240	3.0	241	0.8	481	13.4	326	36.9
1st	942	72	548	7.0	548	2.5	248	3.1	622	1.8	870	11.5	675	31.4
2nd	3,111	286	1,545	7.1	1,545	3.8	825	0.9	2,000	0.2	2,825	10.6	1,970	34.9
3rd	2,493	91	1,065	5.4	1,065	1.9	238	3.4	2,164	0.7	2,402	6.4	1,587	31.8
4th	3,787	184	944	5.3	944	2.9	350	2.0	3,253	0.2	3,603	5.2	2,914	25.6
5th	5,203	936	1,892	5.3	1,892	4.1	805	1.4	3,462	0.4	4,267	8.9	3,443	22.1
6th	3,460	222	1,769	5.0	1,769	3.6	478	2.3	2,760	1.1	3,238	9.1	2,463	30.3
7th	1,902	165	919	5.4	919	2.0	681	2.8	1,056	0.3	1,737	7.1	1,425	27.8
8th	2,348	110	921	3.7	921	4.9	407	3.6	1,831	0.3	2,238	6.0	1,789	24.1
9th	7,515	293	2,675	8.4	2,675	12.0	1,530	1.1	5,692	0.2	7,222	12.4	4,936	32.6
10th	1,457	33	869	4.8	869	3.0	397	3.9	1,027	1.2	1,424	8.3	1,191	25.8
11th	3,999	192	1,789	4.5	1,789	2.6	447	1.7	3,360	0.8	3,807	7.1	2,979	24.2

NOTE: This table does not include data for the U.S. Court of Appeals for the Federal Circuit. Beginning in March 2014, data include miscellaneous applications not included previously. Cases terminated include appeals, original proceedings, and miscellaneous applications.

¹ Docket date is used when computing the median time intervals for original proceedings, miscellaneous applications, and appeals from administrative agencies.

EXIHIBIT 2



FEDERAL RESERVE statistical release

H.15 (519) SELECTED INTEREST RATES

Yields in percent per annum

For use at 2:30 p.m. Eastern Time

September 28, 2015

Instruments	2015 Sep 21	2015 Sep 22	2015 Sep 23	2015 Sep 24	2015 Sep 25	Week Ending		2015 Aug
						Sep 25	Sep 18	
Federal funds (effective) ^{1 2 3}	0.14	0.14	0.14	0.14	0.13	0.14	0.14	0.14
Commercial Paper ^{3 4 5 6}								
Nonfinancial								
1-month	0.14	n.a.	0.13	0.13	0.13	0.13	0.15	0.10
2-month	n.a.	0.15	0.16	0.13	0.17	0.15	0.20	0.14
3-month	n.a.	0.18	0.20	0.19	0.20	0.19	0.26	0.18
Financial								
1-month	0.18	0.12	0.16	0.14	0.14	0.15	0.17	0.13
2-month	0.21	0.19	0.21	0.20	0.21	0.20	0.22	0.20
3-month	0.28	0.26	0.28	0.26	0.27	0.27	0.29	0.26
Eurodollar deposits (London) ^{3 7}								
1-month	0.19	0.19	0.19	0.19	0.19	0.19	0.19	0.19
3-month	0.33	0.33	0.33	0.33	0.33	0.33	0.33	0.33
6-month	0.46	0.46	0.46	0.46	0.46	0.46	0.46	0.46
Bank prime loan ^{2 3 8}	3.25	3.25	3.25	3.25	3.25	3.25	3.25	3.25
Discount window primary credit ^{2 9}	0.75	0.75	0.75	0.75	0.75	0.75	0.75	0.75
U.S. government securities								
Treasury bills (secondary market) ^{3 4}								
4-week	-0.01	-0.02	-0.03	-0.03	-0.02	-0.02	-0.00	0.03
3-month	0.01	-0.01	0.01	0.01	-0.01	0.00	0.04	0.07
6-month	0.11	0.10	0.09	0.09	0.07	0.09	0.21	0.22
1-year	0.35	0.34	0.33	0.31	0.33	0.33	0.40	0.36
Treasury constant maturities								
Nominal ¹⁰								
1-month	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.04
3-month	0.01	0.00	0.01	0.01	0.00	0.01	0.04	0.07
6-month	0.11	0.10	0.09	0.09	0.07	0.09	0.21	0.22
1-year	0.36	0.35	0.34	0.32	0.35	0.34	0.41	0.38
2-year	0.72	0.69	0.70	0.67	0.70	0.70	0.75	0.70
3-year	1.01	0.97	1.00	0.97	1.00	0.99	1.05	1.03
5-year	1.51	1.44	1.47	1.44	1.48	1.47	1.54	1.54
7-year	1.90	1.83	1.85	1.84	1.87	1.86	1.92	1.91
10-year	2.20	2.14	2.16	2.13	2.17	2.16	2.22	2.17
20-year	2.67	2.60	2.60	2.55	2.60	2.60	2.67	2.55
30-year	3.02	2.94	2.95	2.91	2.96	2.96	3.01	2.86
Inflation indexed ¹¹								
5-year	0.32	0.29	0.31	0.33	0.37	0.32	0.33	0.31
7-year	0.51	0.48	0.50	0.51	0.55	0.51	0.51	0.49
10-year	0.66	0.63	0.64	0.64	0.71	0.66	0.66	0.56
20-year	1.05	1.01	1.02	1.01	1.09	1.04	1.02	0.87
30-year	1.30	1.26	1.26	1.24	1.32	1.28	1.25	1.08
Inflation-indexed long-term average ¹²	1.08	1.04	1.04	1.03	1.10	1.06	1.04	0.88
Interest rate swaps ¹³								
1-year	0.52	0.51	0.51	0.50	0.52	0.51	0.56	0.56
2-year	0.82	0.79	0.80	0.77	0.80	0.80	0.87	0.90
3-year	1.10	1.06	1.07	1.02	1.07	1.06	1.15	1.20
4-year	1.34	1.29	1.30	1.25	1.31	1.30	1.39	1.45
5-year	1.54	1.49	1.51	1.45	1.51	1.50	1.60	1.65
7-year	1.88	1.82	1.84	1.77	1.85	1.83	1.93	1.95
10-year	2.20	2.14	2.16	2.09	2.16	2.15	2.25	2.23
30-year	2.72	2.66	2.69	2.59	2.67	2.67	2.74	2.65
Corporate bonds								
Moody's seasoned								
Aaa ¹⁴	4.11	4.01	4.00	3.99	4.05	4.03	4.10	4.04
Baa	5.39	5.29	5.31	5.29	5.36	5.33	5.37	5.19
State & local bonds ¹⁵				3.71		3.71	3.78	3.74
Conventional mortgages ¹⁶				3.86		3.86	3.91	3.91

See overleaf for footnotes.

n.a. Not available.

Footnotes

1. The daily effective federal funds rate is a weighted average of rates on brokered trades.
2. Weekly figures are averages of 7 calendar days ending on Wednesday of the current week; monthly figures include each calendar day in the month.
3. Annualized using a 360-day year or bank interest.
4. On a discount basis.
5. Interest rates interpolated from data on certain commercial paper trades settled by The Depository Trust Company. The trades represent sales of commercial paper by dealers or direct issuers to investors (that is, the offer side). The 1-, 2-, and 3-month rates are equivalent to the 30-, 60-, and 90-day dates reported on the Board's Commercial Paper Web page (www.federalreserve.gov/releases/cp/).
6. Financial paper that is insured by the FDIC's Temporary Liquidity Guarantee Program is not excluded from relevant indexes, nor is any financial or nonfinancial commercial paper that may be directly or indirectly affected by one or more of the Federal Reserve's liquidity facilities. Thus the rates published after September 19, 2008, likely reflect the direct or indirect effects of the new temporary programs and, accordingly, likely are not comparable for some purposes to rates published prior to that period.
7. Source: Bloomberg and CTRB ICAP Fixed Income & Money Market Products.
8. Rate posted by a majority of top 25 (by assets in domestic offices) insured U.S.-chartered commercial banks. Prime is one of several base rates used by banks to price short-term business loans.
9. The rate charged for discounts made and advances extended under the Federal Reserve's primary credit discount window program, which became effective January 9, 2003. This rate replaces that for adjustment credit, which was discontinued after January 8, 2003. For further information, see www.federalreserve.gov/boarddocs/press/bcreg/2002/200210312/default.htm. The rate reported is that for the Federal Reserve Bank of New York. Historical series for the rate on adjustment credit as well as the rate on primary credit are available at www.federalreserve.gov/releases/h15/data.htm.
10. Yields on actively traded non-inflation-indexed issues adjusted to constant maturities. The 30-year Treasury constant maturity series was discontinued on February 18, 2002, and reintroduced on February 9, 2006. From February 18, 2002, to February 9, 2006, the U.S. Treasury published a factor for adjusting the daily nominal 20-year constant maturity in order to estimate a 30-year nominal rate. The historical adjustment factor can be found at www.treasury.gov/resource-center/data-chart-center/interest-rates/. Source: U.S. Treasury.
11. Yields on Treasury inflation protected securities (TIPS) adjusted to constant maturities. Source: U.S. Treasury. Additional information on both nominal and inflation-indexed yields may be found at www.treasury.gov/resource-center/data-chart-center/interest-rates/.
12. Based on the unweighted average bid yields for all TIPS with remaining terms to maturity of more than 10 years.
13. International Swaps and Derivatives Association (ISDA®) mid-market par swap rates. Rates are for a Fixed Rate Payer in return for receiving three month LIBOR, and are based on rates collected at 11:00 a.m. Eastern time by Thomson Reuters and published on Thomson Reuters Page ISDAFIX®1. ISDAFIX is a registered service mark of ISDA®. Source: Thomson Reuters.
14. Moody's Aaa rates through December 6, 2001, are averages of Aaa utility and Aaa industrial bond rates. As of December 7, 2001, these rates are averages of Aaa industrial bonds only. Data obtained from Bloomberg Finance L.P.
15. Bond Buyer Index, general obligation, 20 years to maturity, mixed quality; Thursday quotations. Data obtained from Bloomberg Finance L.P.
16. Contract interest rates on commitments for 30-year fixed-rate first mortgages. Source: Primary Mortgage Market Survey® data provided by Freddie Mac.

Note: Weekly and monthly figures on this release, as well as annual figures available on the Board's historical H.15 web site (see below), are averages of business days unless otherwise noted.

Current and historical H.15 data are available on the Federal Reserve Board's web site (www.federalreserve.gov/). For information about individual copies or subscriptions, contact Publications Services at the Federal Reserve Board (phone 202-452-3244, fax 202-728-5886).

Description of the Treasury Nominal and Inflation-Indexed Constant Maturity Series

Yields on Treasury nominal securities at "constant maturity" are interpolated by the U.S. Treasury from the daily yield curve for non-inflation-indexed Treasury securities. This curve, which relates the yield on a security to its time to maturity, is based on the closing market bid yields on actively traded Treasury securities in the over-the-counter market. These market yields are calculated from composites of quotations obtained by the Federal Reserve Bank of New York. The constant maturity yield values are read from the yield curve at fixed maturities, currently 1, 3, and 6 months and 1, 2, 3, 5, 7, 10, 20, and 30 years. This method provides a yield for a 10-year maturity, for example, even if no outstanding security has exactly 10 years remaining to maturity. Similarly, yields on inflation-indexed securities at "constant maturity" are interpolated from the daily yield curve for Treasury inflation protected securities in the over-the-counter market. The inflation-indexed constant maturity yields are read from this yield curve at fixed maturities, currently 5, 7, 10, 20, and 30 years.